No. 91-1782

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL DELO,

Petitioner,

v.

LARRY GRIFFIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S INTERLOCUTORY ORDER REMANDING THIS CAUSE FOR FURTHER PROCEEDINGS IN DISTRICT COURT PROPERLY RECOGNIZED THAT THE SUBSTANTIVE AND PROCEDURAL ISSUES IN THIS HABEAS CORPUS ACTION HAVE NOT BEEN FULLY FACTUALLY DEVELOPED AND ARE NOT YET RIPE FOR APPELLATE REVIEW.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE ISSUES CONTAINED IN RESPONDENT'S INITIAL HABEAS CORPUS LITIGATION BECAUSE THE ABUSE OF THE WRIT DOCTRINE AS EMBODIED IN RULE 9(b) ONLY APPLIES TO "SECOND OR SUCCESSIVE" PETITIONS.

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S INTERLOCUTORY REMAND ORDER IS NOT INCONSISTENT WITH, BUT INSTEAD PROMOTES THE POLICIES EMBODIED IN THIS COURT'S RECENT OPINIONS IN MCCLESKEY v. ZANT AND IN RE BLODGETT.

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STATEMENT OF THE CASE

Respondent is compelled to correct and clarify petitioner's statement of the case by adding certain important facts and details omitted by petitioner. Respondent, Larry Griffin, has steadfastly maintained his innocence of the murder of Quintin Moss since he was originally charged with this offense. Mr. Griffin's conviction for capital murder rested on evidence that could clearly be characterized as weak and questionable. The only direct evidence connecting Mr. Griffin to the murder of Quintin Moss was a cross-racial photo identification of him by a man named Robert J. Fitzgerald, a multiple convicted felon who at the time of the homicide was enrolled in the federal witness protection program. (Resp. A-3-6). Fitzgerald's credibility was also suspect due to the fact that he received lenient treatment on four pending felony charges in exchange for his testimony against respondent. (Resp. A-4).

No physical evidence linked Mr. Griffin to the murder of Quintin Moss. In fact, fingerprints found on the car used in the drive-by shooting of Mr. Moss did not match the known fingerprints of Mr. Griffin. (Trial Tr. at 363-365). In addition, the jury that found Mr. Griffin guilty did not hear significant exculpatory evidence which would have refuted the state's evidence of motive. (Resp. A-79-90). Trial counsel also failed to present available evidence that Mr. Griffin is left-handed which would have cast further doubt that Mr. Griffin was the person identified by Mr. Fitzgerald as the man firing the fatal shots, in light of the fact that Fitzgerald had testified that the shooter fired the murder weapon right handed. (Resp. A-7). Due to the ineffective performance of

his trial counsel, the jury did not hear this important exculpatory evidence supporting Mr. Griffin's claim of innocence.

After conviction, Mr. Griffin's trial counsel presented no mitigating evidence to the jury and gave a short ineffective closing argument taking less than two pages to transcribe. (Trial Tr. 478-480). The jury thereafter sentenced Mr. Griffin to death. This breakdown of the adversarial system that has very possibly led to a conviction of an innocent man is even more apparent during post-conviction proceedings in this cause. The panel of the Eighth Circuit which decided to remand this case for further proceedings was presented with unrefuted evidence that previous appointed counsel was grossly incompetent and had abandoned Mr. Griffin during both state post-conviction proceedings and during the present initial federal habeas corpus litigation.

Daniel J. Gralike, who represented Mr. Griffin in both state post-conviction proceedings and in initial federal habeas proceedings performed abysmally in failing to recognize and raise valid constitutional claims readily apparent from the state Court record (Resp. A-54-67); and also failed to present any evidence or legal authority in support of claims that he had raised. (Resp. A-52-54). Gralike also filed a clearly deficient brief in the Eighth Circuit. (Resp. A-9-34, 77-78). More importantly, however, the Eighth Circuit panel was presented with uncontradicted evidence that Mr. Gralike had abandoned Mr. Griffin by taking a job with the

Missouri public defender's office in Columbia, Missouri.[1] This clear evidence of abandonment is also shown by the fact that Mr. Gralike did not file a motion for rehearing or rehearing *en banc* on Mr. Griffin's behalf, forcing Mr. Griffin to file his motion *pro se*. (Resp. A-35-46). In light of the uncontradicted evidence of Mr. Gralike's abandonment of Mr. Griffin, the Eighth Circuit panel granted rehearing and remanded the case in the interest of justice to permit Mr. Griffin a full and fair opportunity to litigate all of his claims of constitutional error in one proceeding.

It should also be noted that the Eighth Circuit's opinion complies with the dictates of In re Blodgett, 112 S. Ct. 674 (1992), by ordering the district Court to issue a final judgment on Mr. Griffin's habeas petition within 180 days in order to allow prompt appellate review of the issues in his case. In light of this 180-day time limit and the Eighth Circuit's recent opinion in Rust v. Clarke, 960 F.2d 72 (8th Cir. 1992), petitioner is clearly incorrect in asserting that the Eighth Circuit is deliberately ignoring this Court's pronouncements on finality in McCleskey v. Zant, 111 S. Ct. 1454 (1991) and Blodgett. (Pet. at 19-20).

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[1]Under Missouri law, public defenders are prohibited from otherwise engaging in the practice of law. § 600.021(2) RSMo. (1986).

ARGUMENT

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S INTERLOCUTORY ORDER REMANDING THIS CAUSE FOR FURTHER PROCEEDINGS IN DISTRICT COURT PROPERLY RECOGNIZED THAT THE SUBSTANTIVE AND PROCEDURAL ISSUES IN THIS HABEAS CORPUS ACTION HAVE NOT BEEN FULLY FACTUALLY DEVELOPED AND ARE NOT YET RIPE FOR APPELLATE REVIEW.

The Eighth Circuit's remand order in this cause is not a final judgment. As a result, respondent contends that the factual and legal issues in Mr. Griffin's initial habeas action are not yet ripe for appellate review or discretionary review by this Court.

The Eighth Circuit's order implicitly recognizes that the factual and legal issues contained in this habeas corpus action have not been sufficiently developed in order to allow proper appellate review. Although this Court, unlike the Eighth Circuit, does not at this time have the benefit of the state Court record in this case, an examination of the issues raised in respondent's rehearing pleadings in the Eighth Circuit clearly show that the issues in this case need further factual development in district court. (Resp. A-35-74). Further evidence must be heard in district court not only on the merits of respondent's constitutional claims, but also to address the procedural bar issues injected and advanced by petitioner in this Court. Under established case law both in this Court and the Eighth Circuit, a petitioner is entitled to the opportunity to prove cause and prejudice to excuse abuse of the writ or procedural bar unless the Court can determine as a matter of law that the petitioner would be unable to do so. McCleskey v. Zant, 111 S. Ct. 1454, 1470, (1991). See also Miller v. Solem, 758 F.2d 144 (8th Cir. 1985).

Petitioner also argues that Coleman v. Thompson, 111 S. Ct. 2546 (1991), prevents respondent from establishing cause and prejudice due to the ineffectiveness of counsel during post-conviction proceedings. However, Coleman does not clearly foreclose petitioner from establishing cause and prejudice because many of the purported procedural defaults[2] occurred in the state post-conviction motion Court due to the failure of counsel to present evidence in support of Mr. Griffin's constitutional claims. (Resp. A-52-54). Coleman explicitly left open the question of whether the ineffectiveness of post- conviction motion counsel can establish cause where state post-conviction is the only available state court forum in which to raise certain categories of constitutional claims.[3] Id. at 2567-2568.

Missouri, as in the Virginia post-conviction laws at issue in Coleman, does not permit ineffectiveness of counsel claims to be raised on direct appeal. See State v. Wheat, 775 S.W.2d 155 (Mo. banc 1989). Instead, the first forum in which ineffectiveness

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[2]Many other purported procedural defaults occurred during trial and direct appeal where Mr. Griffin clearly had a constitutional right to counsel. Respondent has exhausted his claims by filing motions to recall the mandate (Resp. A-93-125), a viable post-conviction remedy in Missouri. See Simpson v. Camper, 927 F.2d 392 (8th Cir. 1991); and State v. Sumlin, 820 S.W.2d 487 (Mo. banc 1991). The district court must decide after remand whether these claims are subject to a valid procedural bar.

[3]There is also a conflict of interest issue that could overcome any procedural bar due to the fact Mr. Gralike represented respondent during both state post-conviction proceedings and initial federal habeas proceedings. Gralike could not and did not inject any issue of his ineffectiveness during state post-conviction proceedings as "cause" to overcome any procedural defaults.

claims can be raised is in the state post-conviction motion court. The Eighth Circuit has also recognized that in Missouri, it is still an open question under Coleman as to whether ineffective assistance of post-conviction motion counsel may constitute cause to excuse a procedural default. See Schlup v. Armontrout, 941 F.2d 631, 640, n.9 (8th Cir. 1991). In addition, at least two of Mr. Griffin's ineffective assistance of trial counsel claims would be reviewable by federal courts on the merits notwithstanding any purported procedural bar because they establish his "actual innocence" of the capital murder of Quintin Moss. See Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986).

The first of these "actual innocence" claims involves the ineffective assistance of trial counsel in failing to produce evidence that Mr. Griffin is left-handed to refute the identification testimony of Robert Fitzgerald, who stated that the person he identified as Mr. Griffin shot at the victim with his right hand. (Resp. A-7). The other claim that clearly involves the actual innocence of respondent is an ineffective assistance of trial counsel claim based upon trial counsel's failure to present existing evidence to refute the state's theory that respondent was motivated to kill Quintin Moss because he believed that Moss had previously killed his brother, Dennis Griffin. (Resp. A-79-90).

The Eighth Circuit's interlocutory remand order does not preclude petitioner from asserting any appropriate procedural defenses in district court. In fact, the Eighth Circuit's order specifically notes that respondent is free to assert any appropriate claims

and defenses in district court after remand. (See Pet. A-5). Clearly, the interlocutory remand order by the Eighth Circuit recognized that both the substantive and procedural issues in this habeas action need further development in district court. At this point, the substantive and procedural issues in this case are neither ripe for appellate review by the Eighth Circuit nor the exercise of discretionary review by this Court.

Interlocutory remand orders by courts of appeals are normally not ripe for discretionary review by this Court. This Court has recognized that, except in extraordinary cases, this Court should not grant certiorari to review interlocutory remand orders since they do not involve a final judgment determining all the issues in the case. See, Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327, 328 (1967). See also Hamilton Shoe Co. v. Wolf Brothers, 240 U.S. 251, 257-258 (1916).

The fact that the Eighth Circuit's remand order is not a final judgment is alone a sufficient ground to justify the denial of discretionary review by this Court. Id. Petitioner has not demonstrated that this is an extraordinary case that justifies this Court's departure from its long established practice of refusing to review interlocutory orders from the courts of appeals.[4] Respondent has amply demonstrated both in the Eighth Circuit and in this Court that the legal and factual issues in this habeas action

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[4]There is little doubt that this court will have another opportunity to review some or all of the issues in this case next term after a final judgment is issued in this case.

need to be developed in district Court and are therefore not ripe for review. The writ of certiorari should therefore be denied.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE ISSUES CONTAINED IN RESPONDENT'S INITIAL HABEAS CORPUS LITIGATION BECAUSE THE ABUSE OF THE WRIT DOCTRINE AS EMBODIED IN RULE 9(b) ONLY APPLIES TO "SECOND OR SUCCESSIVE" PETITIONS.

Rule 9(b) of the rules governing habeas corpus cases under 28 U.S.C. § 2254 explicitly provides:

> a second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ. (emphasis added)

The plain language of Rule 9(b) clearly indicates that its provisions are to be applied only to second or successive habeas petitions. Since this matter is before the Court on Mr. Griffin's first habeas petition, it is clear that Rule 9(b) does not apply to this litigation.

Rule 9(b) is expressly limited to second or successive habeas petitions. Therefore, abuse of the writ doctrine has not been held to apply to first habeas petitions. See Bundy v. Dugger, 850 F.2d 1402, 1406-1407 (11th Cir. 1988); and Davis v. Dugger, 829 F.2d 1513, 1518 (11th Cir. 1987).

Even assuming arguendo that abuse of the writ analysis were to apply to Mr. Griffin's initial habeas litigation, remand of this cause would nevertheless be required because it cannot be established as a matter of law that respondent cannot satisfy the cause

and prejudice standard to excuse abuse of the writ.[5] McCleskey, 111 S. Ct. 1454 at 1471. The Eighth Circuit's opinion does not prevent petitioner from asserting abuse of the writ as a defense in district court after remand. (Pet. A-5). In addition, at least two of respondent's claims of constitutional error are reviewable on their merits under the "actual innocence" exception. (See Discussion at p. 6, infra).

The Eighth Circuit panel opinion correctly recognized that any procedural bar defenses asserted by petitioner should and must be resolved in district Court because they involve factual determinations upon which no record has yet been developed. Without a sufficient factual record, even assuming arguendo that abuse of the writ applies in the context of this case, further hearings would be necessary to resolve the abuse of the writ issues. As result, the petition for writ of certiorari should be denied.

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S INTERLOCUTORY REMAND ORDER IS NOT INCONSISTENT WITH, BUT INSTEAD PROMOTES THE POLICIES EMBODIED IN THIS COURT'S RECENT OPINIONS IN MCCLESKEY v. ZANT AND IN RE BLODGETT.

Petitioner asserts that this Court should review this case because the Eighth Circuit panel opinion undermines the policies of finality expressed by this Court in the recent cases of McCleskey v. Zant, 111 S. Ct. 1454 (1991) and In re Blodgett, 112 S. Ct. 674

[5]One of respondent's claims is an allegation that the state deliberately withheld exculpatory information involving witness Robert Fitzgerald (Resp. A-55), in violation of due process under United States v. Bagley, 473 U.S. 667 (1985). There would be cause and prejudice to excuse any abuse of the writ if respondent can establish that the state deliberately withheld material exculpatory evidence. See Amadeo v. Zant, 486 U.S. 214, 222 (1988).

(1992). However, a closer reading of those cases, when examined in light of the uncontroverted evidence that Mr. Griffin had been abandoned by his previous counsel which prevented a full and fair review of his constitutional claims in federal Court,[6] leads to the inevitable conclusion that the Eighth Circuit panel opinion is clearly consistent with the concerns of finality and justice expressed by this Court in both McCleskey and Blodgett.

The policies advanced by this Court in McCleskey are not contradicted by the Eighth Circuit's decision to remand Mr. Griffin's case so that his constitutional claims may be fully and fairly considered in a federal forum. The opinion in McCleskey examined in painstaking detail the history of the federal writ of habeas corpus. In holding that abusive petitions should be limited, this Court recognized the importance of appellate review in assuring that a habeas petitioner has a full and fair opportunity to litigate his claims in federal Court. 111 S. Ct. at 1462-1463. Moreover, this Court in McCleskey explicitly recognized the duty of habeas counsel to "conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition." Id. at 1472.

Petitioner also prominently cites In re Blodgett, 112 S. Ct. 674, in support of his position that the Eighth Circuit opinion undermines principles of finality in habeas litigation. This

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[6]Petitioner does not argue that courts of appeal lack the inherent authority to grant rehearing and/or remand a case when confronted with uncontradicted evidence of attorney incompetence or abandonment of a litigant by counsel. See Ziegler v. Wainwright, 805 F.2d 1422, 1425-26 (11th Cir. 1986).

Court's opinion in Blodgett in fact provides support for the Eighth Circuit's opinion remanding this cause for one full and fair hearing in federal court on Mr. Griffin's constitutional claims. The Eighth Circuit's order remanding this case will serve to avoid the acknowledged problem of piecemeal litigation and multiple filings in federal habeas actions. 112 S. Ct. at 676. Moreover, this Court specifically stated in Blodgett that:

> In a capital case, the grant of a stay of execution directed to a state by a federal Court imposing on that Court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

Id. at 676-677. (emphasis added)

This language from Blodgett clearly reflects the tension between finality in the resolution of capital habeas petitions and the federal court's duty to permit petitioners a full and fair opportunity to litigate their claims of constitutional error. This language from Blodgett recognizes that the interest of finality must in rare cases yield to the interest of justice.[7] In light of the uncontradicted evidence that due to the abandonment of Mr. Griffin by his previous appointed counsel he never received full and fair consideration of his constitutional claims in federal

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[7]Petitioner also argues without citing any authority that the Eighth Circuit opinion creates a new rule regarding remand procedures in habeas cases. (Pet. at 22). This argument clearly lacks merit. Walker v. Lockhart, 726 F.2d 1238, 1265 (8th Cir. 1984), in which the court remanded a habeas case in the interest of justice, was decided prior to the time respondent's conviction became final for purposes of "retroactivity" analysis.

court, this is clearly a case where the interest of justice outweighs any interest in finality.

In contrast to the petitioner's position, the Eighth Circuit panel opinion recognized Blodgett's dictate that habeas cases should be decided promptly by ordering the district court to issue a final ruling on Mr. Griffin's claims within 180 days and thereafter certify those findings to the Eighth Circuit to allow expeditious appellate review. It is the petitioner who is in fact frustrating the policies of Blodgett by injecting procedural issues in this Court and previously in the Eighth Circuit without the proper factual record to allow either court to adequately review those issues. The Eighth Circuit properly applied the concerns of finality and the interest of justice to the unique facts[8] of this case. The Eighth Circuit's order in no way violates the teachings of either McCleskey or Blodgett. The petition for writ of certiorari should be denied.

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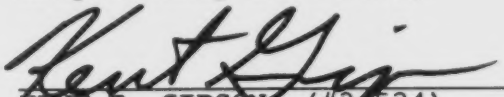
[8]Petitioner has argued without citing any authority that the Eighth Circuit's opinion would create an "automatic remand" rule in all habeas actions where a petitioner can come up with a new claim. (Pet. at 25). Petitioner also argues that the Eighth Circuit opinion establishes a different standard for capital cases in violation of Smith v. Murray, 477 U.S. 527, 538 (1986). (Pet. at 30). Neither argument is persuasive. The Eighth Circuit has remanded a handful of habeas actions in the interest of justice in both capital and noncapital cases. See Walker v. Lockhart, 726 F.2d 1238 (8th Cir. 1984); Simmons v. Lockhart, 856 F.2d 1144 (8th Cir. 1988); and Williams v. Lockhart, 862 F.2d 155 (8th Cir. 1988). These cases have not created a flood of remands or an automatic remand rule in the Eighth Circuit. This Court should not be duped by petitioner's unsupported alarmist rhetoric.

CONCLUSION

The record in this case clearly establishes that the procedural bar issues which petitioner attempts to inject into this litigation to justify the Court's discretionary review have not been factually developed and are not yet ripe for appellate review. Moreover, the Eighth Circuit's order is not a final judgment. This is not an extraordinary case that would justify a departure from this Court's usual practice of refusing to review interlocutory decisions of the courts of appeals. In addition, since this case involves Mr. Griffin's first habeas petition, abuse of the writ does not apply to these proceedings. Finally, the Eighth Circuit's panel opinion actually promotes the interests of justice, finality and the avoidance of piecemeal litigation that have been emphasized in this Court's recent habeas corpus decisions. For all these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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